

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)

CONSUMERS POWER COMPANY)

(Midland Plant, Units 1 and 2))

Docket Nos. 50-329

50-330

(Remand Proceeding)

NRC STAFF RESPONSE TO SAGINAW VALLEY'S MOTION TO
STRIKE THE BRIEF OF DOW CHEMICAL COMPANY



Michael N. Wilcove
Counsel for NRC Staff

Dated: April 16, 1982

DESIGNATED ORIGINAL

Certified By W. Wilcove

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I. INTRODUCTION

On March 30, 1982, Saginaw Valley Nuclear Study Group (Saginaw Valley) moved to strike the brief filed by Dow Chemical Company (Dow) in response to the Saginaw Valley brief in support of exceptions to the Licensing Board's Partial Initial Decision.^{1/}

For reasons which follow, the NRC Staff opposes Saginaw Valley's motion.

II. BACKGROUND

On December 22, 1981, the presiding Atomic Safety and Licensing Board in its Partial Initial Decision determined, notwithstanding its findings with respect to the conduct of certain parties in connection with the presentation of direct testimony, that sanctions were neither necessary nor appropriate. Saginaw Valley filed on January 17, 1982, exceptions to the Partial Initial Decision and its supporting brief on

^{1/} Motion to Strike the Brief of Dow Chemical Company Filed In This Cause Under Date Of March 22, 1982 (hereafter "Motion").

February 22, 1982. Dow, on March 22, 1982, filed a brief in opposition to Saginaw Valley's brief. Thereafter, Saginaw Valley's motion to strike Dow's brief was filed on March 30, 1982.

III. DISCUSSION

A. Saginaw Valley argues that Dow may not challenge the findings of the Licensing Board on the grounds that those findings were not challenged by Saginaw Valley, the only party which filed exceptions in this proceeding.^{2/}

Saginaw Valley's argument is without merit. As clearly stated in Public Service Company of Oklahoma, et al. (Black Fox Station, Units 1 and 2), ALAB-573, 10 NRC 775, 789 (1979);

It is correct that parties satisfied with the result on an issue may not themselves appeal. But if the other side appeals they are free to defend a result in their favor on any ground presented in the record, including one rejected below.

See also, Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-282, 2 NRC 9, 10 fn.1 (1975); Niagara Mohawk Power Corporation (Nine Mile Point, Unit 2), ALAB-264, 1 NRC 347, 357 (1975).

The Licensing Board in this proceeding declined to impose sanctions against the parties. Dow, therefore, was presumably satisfied with the result of that decision. Now that Saginaw Valley has appealed the Licensing Board's determination not to impose sanctions, Dow is free to defend that determination on any grounds including those rejected by the Licensing Board.

^{2/} Id. at 1.

B. Saginaw Valley goes on to challenge the assertion, stated by Dow in its brief, that Saginaw Valley's lack of participation in this proceeding prevents it from taking exception to the Partial Initial Decision. (Motion at 3.) Saginaw Valley suggests that since it is precluded by 10 CFR § 2.762 from responding on this matter, Dow should have raised it by motion in order to afford it such an opportunity. (Id.) To the extent that Saginaw Valley perceives the need to file such a response and believes that it can establish good cause therefor, it certainly has the right to seek leave of the Appeal Board to do so.

Beyond that, Saginaw Valley's motion states but an unparticularized conclusion respecting the merit of Dow's argument that Saginaw Valley may not appeal. Accordingly, it provides no support for the motion to strike Dow's brief and should be rejected.

IV. CONCLUSION

For the foregoing reasons, the Staff opposes Saginaw Valley's Motion to Strike the Brief of Dow Chemical Company Filed In This Cause Under Date Of March 22, 1982, and urges that the motion be denied.

Respectfully submitted,



Michael N. Wilcove
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 16th day of April, 1982

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO SAGINAW VALLEY'S MOTION TO STRIKE THE BRIEF OF DOW CHEMICAL COMPANY" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, this 16th day of April, 1982:

*Christine N. Kohl, Chairman
Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. J. Venn Leeds, Jr.
Administrative Judge
Atomic Safety and Licensing Board
10807 Atwell
Houston, Texas 77096

*Dr. W. Reed Johnson
Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Dr. Emmeth A. Luebke
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Gary J. Edles
Atomic Safety and Licensing Appeal
Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Judd L. Bacon, Esq.
Legal Department
Consumers Power Company
212 West Michigan Avenue
Jackson, Michigan 49201

*Marshall E. Miller, Esq.
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Harold F. Reis, Esq.
Robert Lowenstein, Esq.
Lowenstein, Newman, Reis and
Axelrad
1025 Connecticut Avenue
Washington, D.C. 20036

Ms. Mary Sinclair
5711 Summerset Street
Midland, Michigan 48640

Michael I. Miller
Ronald G. Zamirin, Esq.
Martha E. Gibbs, Esq.
Caryl A. Bartelman, Esq.
Isham, Lincoln & Beale
One First National Plaza
42nd Floor
Chicago, Illinois 60603

Myron M. Cherry
Cherry & Flynn
Suite 3700
Three First National Plaza
Chicago, Illinois 60602

T. J. Cresswell, Esq.
Michigan Division
Legal Department
Dow Chemical Company
Midland, Michigan 48640

Barton Z. Cowan, Esq.
Chairman AIF Lawyers Committee
42nd Floor, 600 Grant Street
Pittsburgh, Pennsylvania 15219

Gerald Charnoff, Esq.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, D.C. 20036

William C. Potter, Jr.
Fischer, Franklin, Ford, Simon
and Hogg
1700 Guardian Building
Detroit, Michigan 48226

*Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Atomic Safety & Licensing Appeal
Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

*Docketing & Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555



Michael N. Wilcove
Counsel for NRC Staff